2015 WL 471787 (N.Y.Sup.), 2015 N.Y. Slip Op. 30169(U) (Trial Order)
Supreme Court, New York.
New York County

Rezwanul CHOWDHURY, Alberto Moreno, Abdias Perez, Yobani Tarax, Guillermo Chavez, Carlos Lazaro Ramos, Nelson Crisantos, Baraquel Cruz, Rosalio Ruiz, Jesse Sanchez, Ivan Garcia, and Marcos Flores on behalf of themselves and others similarly situated, Plaintiffs,

v.

GK GRILL LLC d/b/a Le Marias Restaurant, and Jose Meirelles, Defendants.

No. 153996/14.
February 3, 2015.

Trial Order

Hon. Anil C. Singh, J.

***1** Plaintiffs move for class action certification (motion sequence no. 002). Defendants move for dismissal of the second amended complaint (motion sequence no. 003). For convenience, the motions are consolidated.

This action involves former employees of a New York restaurant. The prospective class of plaintiffs consist of servers, runners, bussers and bar employees who participated in the tip pools at the restaurant. Plaintiffs allege that defendants, who own and operate the restaurant, are liable for misappropriation of gratuities, failure to pay spread of hours premiums, overtime wage violations, and minimum wage violations under Articles 6 and 19 of the New York Labor Law (Labor Law).

According to plaintiffs, a mandatory tip pool was maintained by the restaurant, and the following categories of workers participated: servers, runners, bussers, bartenders and maitre'ds. Plaintiffs contend that maitre'ds are management, or agents of management, so their participation in the tip pool is illegal. As a result of the maitre'ds' participation, the other workers allegedly received less money from tips than they were otherwise entitled to. In addition, they allege that the tipped workers were not paid minimum wage and were required to work off the clock, so they were not paid for all the hours they worked or for overtime.

Plaintiffs submit affidavits from the moving plaintiffs, who aver that they are knowledgeable of defendants' restaurant, tipping practices and policies regarding working off the clock. Plaintiffs also submit a proposed class notice.

Defendants seek the dismissal of the amended complaint on the following grounds: the maitre'ds in this action are not managers who are not legally allowed to participate in the tip pool; the tip credit damages sought by plaintiffs are not permissible under New York law; and there is sufficient documentary proof that plaintiffs were paid appropriate spread of hours premiums by defendants.

In opposition to the motion, plaintiffs contend there are issues concerning the degree to which the individual maitre'ds are managerial employees, as it relates to their alleged authority over the other participants of the tip pool. Plaintiffs defend their pursuit of tip credit damages, claiming that there is a legal basis for such a recovery. Plaintiffs question the extent and the accuracy of the documentary evidence as it covers the restaurant's spread of hours records.

The court shall first reach a determination as to whether to dismiss the amended complaint. The first cause of action in this complaint is for defendants' failure to pay the full minimum wage for each hour plaintiffs worked, in violation of section 650 of the Labor Law. The second cause of action is for defendants' failure to pay full overtime wages for each hour worked over forty

hours a week, in violation of section 650 of the Labor Law. The third cause of action is for defendants' failure to pay spread of hours premium for work days that lasted longer than ten hours, in violation of section 650 of the Labor Law. Pursuant to section 196-d of the Labor Law, certain employees who work over ten hours in a workday are entitled to an additional hour's pay at the basic New York minimum hourly wage rate. This constitutes a spread of hours premium. The fourth cause of action is for defendants' unlawful retention of tips, in violation of section 196-d of the Labor Law. Plaintiffs seek class certification; compensatory damages, including liquidated damages (subsequently waived by plaintiffs) and pre- and post-judgment interest; a repayment of tips, minimum wages, payment of spread of hours premiums and overtime pay; and attorneys' fees.

***2** Defendants seek dismissal on the grounds that plaintiffs have failed to state an adequate cause of action (CPLR 3211 [a] [7]) and documentary evidence warrants dismissal (CPLR 3211 [a] [1]). On a motion to dismiss, one must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every favorable inference. *See Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). A motion to dismiss for failure to state a cause of action must be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *See Shelia C. v Povich*, 11 AD3d 120, 122 (1st Dept 2004). As for documentary evidence, granting the motion to dismiss " 'is warranted only if documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (citation omitted).' " *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001).

Defendants' first argument concerning a failure to state a cause of action is that the three named maitre'ds in the complaint have not been sufficiently alleged to be agents of management, or to have managerial authority over the other participants of the pool. Plaintiffs maintain that these individuals, Daniel Viddi, Dorian and Manuel, are ineligible to participate in the tip pool because they represent management. Pursuant to section 196-d of the Labor Law, no employer or his agent "shall demand or accept, directly or indirectly, any part of a gratuity, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." Defendants claim the only specific allegations in the complaint - that Viddi terminated the employment of one busser and another person identified as Marco - are insufficient to establish Viddi as management. The rest of the allegations, that these individuals had authority to discipline employees and instruct them to perform certain tasks are, according to defendants, highly speculative.

In response, plaintiffs argue that they have sufficiently alleged that the three maitre'ds exercised meaningful or significant control over the employees, and have provided examples of how the work schedules and habits of specific employees were effected by them. Because of these alleged displays of authority, plaintiffs contend that the maitre'ds are managers and ineligible to participate in the tip pool. Plaintiffs state that even if Viddi were the only individual sufficiently shown to be a managerial employee, they would have valid causes of action for Labor Law violations. Plaintiffs claim that, if there is a factual dispute as to whether or not the maitre'ds were eligible to participate in the tip pool, a motion to dismiss this complaint should fail.

***3** A motion to dismiss must be denied " 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exist regarding it (citations omitted).' " *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 (2d Dept 2012). Defendants contend that the maitre'ds in this case lacked the authority to exercise independent managerial tasks, at least with respect to Dorian and Manuel. Plaintiffs state that the maitre'ds had the authority to hire and fire employees, to supervise and discipline tipped employees, to assign employees to specific jobs and to maintain employment records.

The various affidavits from former employees provided by plaintiffs attest to the activities of Viddi at the restaurant, and they appear sufficient at this time to raise a factual issue as to whether Viddi would qualify as a managerial person. Plaintiffs have not sufficiently alleged that Dorian and Manuel are management. However, if it eventually is shown that Viddi was an agent of the management, that might demonstrate a violation of the Labor Law.

Because Viddi's work status is subject to dispute by the parties and cannot be determined now, the motion to dismiss will not be granted on this issue.

The next issue raised by defendants is one of damages, not liability. Defendants claim that the proper remedy for a violation of section 196-d is the return of any misappropriated tips rather than the loss of the tip credit, as asserted by plaintiffs.

A brief definition of tip credit is as follows: pursuant to 12 NYCRR 146-1.3, employers can pay tipped employees a cash wage less than the minimum wage if employees receive gratuities sufficient to compensate for the difference. The employer can claim a tip credit from employees and pay employees a lower cash wage if the total of tips received plus wages equals or exceeds $7.25 per hour. Employees must be given proper notice of a credit, the employer must keep adequate records of the amount of tips received by employees, and employees must be provided wage statements specifying the amount of the tip credit. As of January 1, 2011, employers are entitled to a tip credit of only $2.25 per hour.

Even if an unqualified employee such as a manager participated in a tip pool, defendants claim that they would not be compelled to pay back the tip credit to plaintiffs. They cite section 196-d of the Labor Law, which provides, in part, that "[n]othing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter." Defendants argue that the statute does not specifically provide that an employer is compelled to repay a tip credit upon a violation of the law.

***4** Neither side has cited state court decisions to support their legal positions. Defendants cite Department of Labor (DOL) opinion letters, and plaintiffs cite Federal court decisions. For example, plaintiffs cite *Hai Ming Lu v Jing Fong Rest., Inc.*, 503 F Supp 2d 706, 711 (SD NY 2007), which holds that violations of section 196-d of the Labor Law render an employer ineligible to receive a tip credit under New York law. Plaintiffs have also claimed that there has been an amendment in the DOL rules. Pursuant to 12 NYCRR 146, a condition is placed on an employer's ability to apply a tip credit. The rule provides that an employer may take a credit towards the basic minimum hourly rate, if an employee receives enough tips and if the employee has been notified of the tip credit. Failure to do so would mean loss of that credit to the employer.

The court notes that the DOL opinion letters are not the equivalent of the law. Moreover, in analyzing the two letters cited by defendants in their opposition papers, the court does not find that they expressly rule out the penalty of reimbursement of a tip credit to an employee. The federal cases, as cited by plaintiffs, uphold the reimbursement of a tip credit to the employees due to an employer's violations of Labor Law regulations. *See e.g., See Copantitla v Fiskardo Estiatorio, Inc.*, 788 F Supp 2d 253 (SD NY 2011); *Chung v New Silver Palace Rest., Inc., 246* F Supp 2d 220 (SD NY 2002). "Federal case law is at best persuasive in the absence of state authority." *Cox v Microsoft Corp.*, 290 AD2d 206, 207 (1st Dept 2002). Plaintiffs have provided legal support for the proposition that, under appropriate circumstances, employers can be ordered to repay a tip credit to its employees, as part of compensatory relief. Therefore, this court shall not dismiss this particular form of relief.

Defendants argue that they have submitted enough documentary evidence to show that employees were paid their spread-of-hours premiums. The restaurant records cover three of the twelve named plaintiffs - Lazaro Ramos, Guillermo Chavez and Yobani Perez Tarax. Plaintiffs contend that the records related to the other named plaintiffs were not provided by defendants. In reply, defendants contend that, prior to new regulations implemented by DOL on January 1, 2010, restauranteurs were not required to pay spread-of-hours premiums to their employees. Defendants claim that their records indicate that the plaintiffs whose records they have provided were paid these premiums after 2011, pursuant to these DOL regulations.

The amended complaint alleges that plaintiffs were not paid for those times they worked over ten hours in a shift, and that they were required to work off the clock. Defendants have not submitted the records of all the named plaintiffs. The documentary evidence provides only partial information as to the pay and working schedule of these former employees. Therefore, it does not conclusively dispose of plaintiffs' claim against defendants on the matter of spread-of-hours premiums. The court shall not dismiss this complaint pursuant to CPLR 3211 (a) (1). Therefore, the court shall not grant the motion to dismiss the amended complaint.

***5** The court shall decide on plaintiffs' motion for class action certification. The five prerequisites for a valid class action pursuant to CPLR 901(a) are: (1) the class of plaintiffs is so numerous that joinder is impracticable; (2) there are questions of law or fact common to all plaintiffs in the class: (3) the claims and defenses of the class representatives are typical of all class members; (4) the class representatives will fairly and adequately protect the interests of the class; and (5) the class action is the superior method for fair and efficient adjudication of the class's claims. *See Small v Lorillard Tobacco Co.*, 94 NY2d 43, 53 (1999). It is plaintiffs' contention that they have met each of these prerequisites.

The representatives for the proposed class have the burden of demonstrating that all five prerequisites have been met. *See CLC/CFI Liquidating Trust v Bloomingdale's Inc.*, 50 AD3d 446, 447 (1st Dept 2008). The showing must be made with competent evidence, not mere conclusory allegations. *See Katz v NVF Co.*, 100 AD2d 470, 473 (1st Dept 1984). The application of CPLR 901(a) to the facts of a particular case "ordinarily rests within the sound discretion of the trial court." *Small v Lorillard Tobacco Co.*, 94 NY2d at 52. "In exercising this discretion, a court must be mindful of our holding that the class certification statute should be liberally construed (citation omitted)." *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 (1st Dept 2009).

Plaintiffs assert that the proposed class has approximately 100 members, which would make joinder impracticable. Even if the precise number were not certain, plaintiffs state that numerosity could be inferred based on good-faith estimates of named plaintiffs. In their opposition, defendants claim that they entered into releases with a large portion of the putative class, reducing the number of members in this action. Specifically, defendants argue that 38 of these members signed a release of Labor Law claims during an earlier Federal action brought against defendants. In reply, plaintiffs do not dispute this assertion, but state that with the deduction of these individuals, there remains a viable class to certify.

> "There is no 'mechanical test' to determine whether the first requirement - numerosity- has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified. Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it (citations omitted)."

***6** *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 (2d Dept 1980)

As plaintiffs have asserted, "[T]he threshold for impracticability of joinder seems to be around forty...." *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 (SD NY 1998).

The court finds that plaintiffs have provided enough proof to indicate that at least forty members are involved in this matter, and that joinder would be impracticable for the purpose of litigating this suit. While there is a question as to the precise number of individuals in this particular class, plaintiffs, in submitting affidavits from several members of the putative class stating the approximate number of allegedly aggrieved individuals, have shown a reasonable estimate of affected individuals which would preclude joinder. The numerosity prerequisite has been satisfied.

Regarding commonality, plaintiffs contend that each class member's claim centers on the same or similar legal conclusions, namely that the maitre'ds, as defendants' agents, were not eligible to participate in the tip pool, and could not claim tip credit, which was the entitlement of the class members. Defendants claim that some of the class members were not impacted by the tip pool policy. According to them, pursuant to the policy, each bartender received 5% of the tips, each busser received 20% of the tips, each maitre'd received 5-10% of the tips off the top, or based on the gross amount of tips guests left during any particular shift. Based on this structure, the bartenders and bussers allegedly received an "undiluted" share of tips and their share tips were not impacted by the maitre'ds' inclusion in the tip pool. Defendants aver that only after bartenders, bussers and maitre'ds receive their distribution of the tips do the servers and runners receive their tips. Thus, defendants claim that the only employees who would be harmed by the policy are the servers and runners. Defendants contend that this policy fractures the community of the claims between the class members, precluding class certification.

"In order to demonstrate entitlement to proceed as a class action, plaintiffs were required to prove ... that 'there are questions of law and fact common to the class which predominate over any questions affecting only individual members (citation omitted).' " *Banks v Carroll & Graf Publs.,Inc.*, 267 AD2d 68, 69 (1st Dept 1999). "That individual [plaintiffs] have different levels of damages does not defeat class certification." *See Englade v HarperCollins Pubis.*, 289 AD2d 159, 160 (1st Dept 2001).

Plaintiffs maintain that they are addressing a uniform business policy which has affected these employees - that is, inadequate compensation due to illegal participation in a mandatory tip pool. In alleging a constant policy of underpayment, plaintiffs argue that a predominance of common, if not identical, issues of law and fact over the question of damages makes this action amendable to class certification.

***7** Based on the information submitted, the court finds that, despite some differences among individual members of the proposed class, and despite an issue as to the level of harm experienced by specific categories of employees, common questions of law and facts predominate over individual ones. Therefore, the commonality prerequisite has been satisfied.

The status of the parties representing the class representatives is the next issue. This involves both their common interests with those whom they represent, as well as their competence in adjudicating this matter. Several factors are pertinent here: potential conflicts of interest; personal characteristics of the proposed class representatives; and quality of the class counsel. *See Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 24 (1st Dept 1991).

Plaintiffs argue that the class representatives are former employees who were participants in the tip pool who can identify with the interests of the class. They claim that the representatives worked at the restaurant during the same period as the class members and were subject to the same grievances, such as minimum wage violations. Plaintiffs also argue that these representatives are able to fairly and adequately protect the interests of the class, having no conflict of interest problems, and maintaining a competent counsel, a familiarity with the law suit, and sufficient financial resources to prosecute the action. Defendants contend that plaintiffs are not adequate class representatives, though their argument lacks particularity.

The court finds that there is adequate evidence which indicates that plaintiffs would provide competent protection with respect to the interests of the class and efficient manner of prosecution. The third and fourth prerequisites have been satisfied. *See Ackerman v Price Waterhouse*, 252 AD2d 179, 202 (1st Dept 1998).

The final prerequisite concerns the class action as a superior means of seeking justice. If a class action would dispose of most, if not all, of the issues, it would be the superior method of adjudication. *Id*. at 202. Here, plaintiffs emphasize the matter of the alleged complexity of individual actions and the possibility of inconsistent outcomes in the process. As the injuries endured by plaintiffs as alleged are basically economic in nature, and small in amount, plaintiffs claim that a class action is a desirable procedure in this particular case.

The court finds that plaintiffs' class action would be a more efficient and simpler way of resolving this matter than individual actions.

In addition to the prerequisites for class certification enumerated in CPLR 901(a), the proposed class action must meet the additional prerequisites enumerated in CPLR 902 (1)-(5). CPLR 902 (1), (2) and (3) require the court to consider the interest of members of the class in individually controlling the prosecution or defense of separate actions; the impracticality or inefficiency of prosecuting or defending separate actions; and the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. CPLR 902 (4) requires the court to consider the desirability or undesirability of concentrating the litigation of the claim in this particular forum. CPLR 902 (5) requires the court to consider the difficulties likely to be encountered in the management of the class action.

***8** In short, the court finds that plaintiffs' class action is appropriate. Plaintiffs appear capable of managing the litigation. Moreover, the determination of damages, though not precisely construed, does not appear to be all that difficult at this time.

The court finds no complications regarding this forum as being desirable, as there is no indication that members of the class are out-of-state, or would be inconvenienced by this procedure.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is denied; and it is further

ORDERED that plaintiffs' motion for class certification is granted; and it is further

ORDERED that notices to potential class members be served within 20 days from the date of service of a copy of this order with notice of entry.

DATED: 2/3/15

ENTER:

<<signature>>

J.S.C.

End of Document